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NO. 97-_____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

SHIRLEY I. SCRUGGS,

Petitioner,

vs.

DALE S. WILSON and HAROLD "BUDDY" JIMMISON, *ET. AL.*

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

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3.1.97

QUESTIONS PRESENTED FOR REVIEW

The questions presented by this Petition are:

1. Whether the application of a statute of limitations to an illegitimate child violates the Equal Protection Clause of the Fourteenth Amendment to the federal Constitution where such statute:

1.1. Limits the illegitimate's time for bringing an action to adjudicate her paternity to three years from birth;

1.2. Ran 42 years prior to the illegitimate's being granted the right to inherit by adjudication of paternity; and

1.3. Ran 52 years prior to the state's giving the illegitimate herself the right to adjudicate her own paternity.

2. Whether under the circumstances set forth in Question 1 above, application of the statute to an illegitimate violates her right to due process of law under the Fourteenth Amendment to the federal Constitution.

LIST OF PARTIES

Additional parties Respondent are H.H. Adams, Flora C. Jones, Louise G. Smith, Frank 0. Young, Alma Young, and Clyde S. Hicks.

All parties below are parties to this proceeding.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

LIST OF PARTIES. ii

TABLE OF CONTENTS. iii

TABLE OF AUTHORITIES iv

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE. 5

A. The Facts Material to the Questions Presented 5

B. Statutory History Material to the Case 6

C. The Proceedings Below 9

REASONS FOR GRANTING THE PETITION 13

I. Conflicts with Other Decisions... 14

II. The Question Presented is Important 23

III. The Decision is Wrong. 28

CONCLUSION 30

TABLE OF AUTHORITIES

Case(s)	Page
Callison v. Callison, 687 P.2d 106 (1984).....	23
Clark v. Jeter, 486 U.S. 456, 463 100 L.Ed. 465, 108 S.Ct. 1910 (1988).....	23
Dickson v. Simpson, 807 S.W. 2d 726 (Texas 1991)...	14,16,17,18
Gomez v. Perez, 409 U.S. 535, 35 L.Ed. 2d 56, 93 S.Ct. 872 1973).....	18,19,30
Lalli v. Lalli, 439, U.S. 259, 58 L.Ed. 2d 303, 99 S. Ct. 518.....	27
Reed v. Campbell, 476 U.S. 852, 90 L.Ed. 2d 858, 106 S.Ct. 2234.....	22
Smith v. Mott, 100 So.2d 173, 176 (Fla. 1957).....	29
State Department of Revenue v. Wilson 634 P.2d 172 (1981).....	22,23
Wall v. Johnson, 78 So.2d 371 (1955).....	20
Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 172-3, 31 L.Ed. 2d 768, 92 .Ct. 1400 (1972).....	20,21

CONSTITUTION

Fourteenth Amendment, U.S. Constitution.....4,5,10,26,30

TABLE OF AUTHORITIES (Con't)

Page

STATUTES

28 U.S.C. §1257(a)..... 3

Section 95(3)(b), Florida Statutes (1991).....4,12

Section 95(5)(a), Florida Statutes (1932).....4,16

Section 95.11(3)(b), Florida Statutes (1991).....3,9,10 12,13,17

Section 95.11(5)(a), Florida Statutes (1932).....3,8

Section 95.11(9), Florida Statutes..... 8

Section 382.20, Florida Statutes..... 28

Section 731.29, Florida Statutes..... 7

Section 732.108(b), Florida Statutes.....12,13

Section 732.108(2), Florida Statutes (1991).....3,7,16,18

Section 732.108(2)(b), Florida Statutes.....9,21

Section 742.011, Florida Statutes (1986).....7,8,17,18

Chapter 16103, Laws of Fla. (1933)... 7

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Shirley I. Scruggs, respectfully prays that a writ of certiorari issue to review the opinion and judgment of the Supreme Court of Florida entered in this case on July 18, 1996.

OPINIONS BELOW

The substituted opinion of the Supreme Court of Florida (App. 1a-17a), from which opinion this Petition is taken, is reported

at ____ So. 2d ____; the Supreme Court of Florida's denial of Petitioner's Petition for Rehearing thereof (App. 19a) is reported at ____ So. 2d ____; the initial opinion of the Supreme Court of Florida (App. 20a-34a) is unreported; the opinion of the First District Court of Appeal of Florida (App. 35a-51a) is reported at 640 So. 2d 1152; and the opinion of the Circuit Court of the 4th Judicial Circuit, State of Florida (App. 52a-54a) is unreported.

JURISDICTION

The Florida Supreme Court entered its initial judgment herein on November 22, 1995. A timely Petition for Rehearing was filed by Respondents herein and granted by the Florida Supreme Court, and pursuant thereto, the Florida Supreme Court withdrew its opinion, and entered its revised opinion on July 18, 1996. Petitioner timely filed a Petition for Rehearing, which was denied by the Florida Supreme Court on January 8, 1997.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTES INVOLVED

This case involves § 732.108(2), Florida Statutes (1991), Florida's statute governing proof of paternity in probate proceedings, and § 95.11(5)(a), Florida Statutes (1932) and its successor, § 95.11(3)(b), Florida Statutes (1991), Florida's statute of limitations providing time limits for actions to adjudicate paternity.

Florida's Probate/Inheritance by Intestacy statute, § 732.108(2), Florida Statutes (1991), provides as follows:

> "(2) For the purpose of intestate succession ..., a person born out of wedlock is a lineal descendant of his mother and is one of the natural kindred of all members of the mother's family. The person is also a lineal descendant of his father and is one of the natural kindred of all members of the father's family, if: (a) The natural parents participated in a marriage ceremony before or after the birth of the person born out

> of wedlock, even though the attempted marriage is void. (b) The paternity of the father is established by an adjudication before or after the death of the father. (c) The paternity of the father is acknowledged in writing by the father."

Florida's statute of limitations, § 95(5)(a), Florida Statutes (1932), provided a limitation upon bastardy (paternity) actions of 3 years from birth of the illegitimate. § 95(3)(b), Florida Statutes (1991), provides a 4 year limitation upon paternity actions as follows:

> "...(b) An action relating to the determination of paternity, with the time running from the date the child reaches the age of majority."

CONSTITUTIONAL PROVISIONS INVOLVED

This case requires interpretation and application of the Fourteenth Amendment to the Constitution of the United States. Section 1 of the Fourteenth Amendment provides in pertinent part as follows:

"No state shall...; nor shall any

State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A. The Facts Material to the Questions Presented.

Petitioner alleged below that she is the illegitimate daughter of Charles W. Smith, deceased, who died on January 18, 1992 at the age of 82. She was born on February 22, 1932, and was issued a birth certificate from the State of Florida stating that her father was Charles Smith. No written acknowledgment of paternity is known to exist, nor did her mother and father ever participate together in a marriage ceremony, nor has a judgment establishing paternity ever been entered. After the decedent's death, a Petition for Probate of his alleged will was filed, the will was admitted to

probate and Letters Testamentary issued accordingly. Petitioner is not a beneficiary under such will. Petitioner timely filed a Petition for Revocation of Probate and Letters of Administration, in which Petitioner alleged that she was the daughter of the decedent, and that Decedent lacked testamentary capacity to make his Will, that the Will was the product of undue influence, and that it was the product of fraud, duress and mistake.

B. Statutory History Material to the Case.

Both Florida's statute of limitations applicable to proof of paternity and its Probate Code/Inheritance statutes are involved in the consideration of these questions.

1. Inheritance Rights. At the time of Petitioner's birth in 1932, she as an illegitimate had no right to intestate

inheritance from her natural father. The right of an illegitimate child to intestate inheritance was created by Chapter 16103, Section 30, Acts of 1933, which provided that a child born out of wedlock could inherit from the father only if the father acknowledged paternity in writing in the presence of a competent witness. This provision subsequently was numbered Florida Statutes § 731.29, and remained in effect until it was amended with the passage of Florida Statutes § 732.108(2) quoted at page 3 above, effective January 1, 1976.

2. Right to Adjudicate Paternity.

Prior to 1986, an illegitimate had no right to adjudicate her own paternity. The right of an illegitimate to adjudicate paternity in her own right was given to an illegitimate with the amendment of Florida Statutes § 742.011 (the paternity statute)

effective October 1, 1986, which amendment provided that "...any **child** may bring proceedings..." to establish paternity.

3. The Statute of Limitations.

The statute of limitations in effect and which applied to Petitioner at the time of her birth in 1932 was Florida Statutes § 95.11(5)(a), which imposed a 3 year limitation on the adjudication of paternity, with the time running from birth. This statute remained in effect until 1959, when Florida Statutes § 95.11(9) was enacted. It stated that a "bastardy proceeding" could be instituted at any time within 4 years of the date of birth of the illegitimate. In 1986, the statute was amended once again to its present form by the addition of the following language to the 4 year statute of limitations: "...with the time running from the date the child reaches the age of majority."

See Chart 1, Timeline Comparison, Factual and Statutory Interactions, App. 55a-56a.

C. The Proceedings Below.

The trial court dismissed Petitioner's Petition with prejudice, holding that under Florida's applicable Probate/Inheritance by Intestacy statute, Florida Statutes § 732.108(2)(b), the only method by which Petitioner could prove her paternity, and thus establish her right as an "interested person" to challenge the validity of decedent's will, was by an adjudication of paternity, and that she was time barred by Florida's 1986 statute of limitations, Florida Statutes § 95.11(3)(b), from doing so.

Petitioner appealed to the First District Court of Appeals of Florida, arguing, among other grounds, that the decision violated Petitioner's right to due

process and equal protection under the Fourteenth Amendment to the federal Constitution. The First District unanimously reversed the trial court, ruling that application of Florida's 1986 statute of limitations, Florida Statutes § 95.11(3)(b), to Petitioner constituted a denial of due process via access to courts, and noting that the decision would also constitute a denial of equal protection under both the Florida and Federal constitutions.

Respondents appealed such judgment to the Florida Supreme Court, which initially unanimously upheld the First District Court of Appeals upon other grounds, i.e. that the 1986 statute of limitations did not apply to Petitioner, thereby avoiding the constitutional issues.

Thereafter, Respondents filed a Petition for Rehearing which was granted, and the Florida Supreme Court unanimously reversed itself, issuing a substituted

opinion and ruling that the statute of limitations did apply to Petitioner, that the correct statute of limitations to apply was the original, 1932 3-year from birth statute, not the 1986 statute, and that application of the 1932 3-year from birth statute was not unconstitutional.

Petitioner thereafter filed a timely Motion for Rehearing, which was denied on January 8, 1997

D. How The Federal Questions Were Presented.

The federal questions were first raised at the trial court in response to Respondent's Motion for Summary Judgment. In addition to orally raising same at hearing, Petitioner raised both due process and equal protection violations in written form in Petitioner's Memorandum of Law at R. 58-68 (not reproduced herein), and again in Petitioner's Memorandum of Law at R. 86-88 (not reproduced herein).

The federal questions were again raised by Petitioner at Florida's First District Court of Appeals. Point 1 of Petitioner's Initial Brief to the First District Court of Appeals states regarding the issue of due process: "APPLICATION OF SECTION 95.11 (3)(b), FLORIDA STATUTES, TO APPELLANT CONSTITUTES RETROACTIVE APPLICATION OF AN ACT WHICH IMPOSED A NEWLY CREATED OBLIGATION, AND THEREBY DENIES APPELLANT'S RIGHT TO DUE PROCESS UNDER ARTICLE 1, SECTION 2, FLORIDA CONSTITUTION, AND THE FOURTEENTH AMENDMENT, SECTION 1 OF THE UNITED STATES CONSTITUTION, IN THAT APPELLANT IS DENIED THE RIGHT TO PROVE THE PATERNITY OF HER FATHER."

Point 3 of Petitioner's Initial Brief to the Fisrt District Court of Appeals states regarding the issue of equal protection: "APPLICATION OF SECTION 732.108(b), FLORIDA STATUTES, TO APPELLANT DENIES APPELLANT'S RIGHT TO EQUAL PROTECTION UNDER THE LAWS, IN VIOLATION OF ARTICLE 2, FLORIDA CONSTITUTION, AND THE FOURTEENTH AMENDMENT, SECTION 1, OF

THE UNITED STATES CONSTITUTION."

All of the federal questions were again raised by Petitioner at Florida's Supreme Court. The First District Court of Appeals ruling and the Florida Supreme Courts's focus upon and consideration of these issues is illustrated by the Florida Supreme Court's statement in its initial opinion at ____ So. 2d. ____ (App. 24a), referring to the First District Court of Appeals opinion considering such issues: "The District Court also concluded that if section 95.11(3)(b) were construed to bar Scruggs' claim, it would be unconstitutional as applied on the ground that it violated the equal protection and access to courts provisions of this state's constitution as well as the equal protection clause of the United States Constitution."

REASONS FOR GRANTING THE PETITION

The Florida Supreme Court opinion conflicts with the decisions of the United States Supreme Court and the Supreme Courts

of other states. The result of such conflicts is a lack of uniformity in the law as between states. Under the facts of this case before the Court, an illegitimate has the right to sue in Texas, Oklahoma and Montana, states which have addressed the issues herein.

I. Conflicts With Other Decisions.

A. An Impenetrable Barrier Has Been Erected.

The ruling of the Florida Supreme Court directly conflicts with the Supreme Court of Texas in Dickson v. Simpson, 807 S.W. 2d 726 (Texas 1991), which held on facts virtually identical to those in the instant case that an illegitimate was denied equal protection of the laws. The illegitimate child in Dickson, again a daughter, was born out of wedlock the same year as Petitioner. Similarly, the parents never married either before or after the birth of the child, and

the father never acknowledged paternity in writing, the two other methods for proving paternity under Texas law as well as under Florida law, and under the laws of many other states. There, as here, the only method available to the illegitimate daughter for her proof of her own paternity was to prove paternity through an adjudication.

There, as here, the paternity statute of limitations was applied to her. There, as here, the statute which was sought to be applied was amended several times during the illegitimate's life. There, as here, each time the statute was amended, the illegitimate was already beyond the age by which a petition for adjudication of paternity was required to be brought by the statute of limitations. The Texas Supreme Court held at 727 and 728 that the illegitimate child was **never given the opportunity** to prove her paternity, and therefore was denied equal protection of the laws. See chart 1, Timeline Comparison,

Factual and Statutory Interactions, App. 55a-56a.

In Petitioner's case, the statute of limitations applied by the Supreme Court in its substituted opinion was Florida Statutes § 95.11(5)(a), running 3 years from birth. For the first year, until 1933, there was a complete bar to her inheritance, leaving the window of 1933 and 1934 for the 1 and 2 year old Petitioner to prove paternity. As in Dickson, however, the statute ran prior to the Petitioner being given either the right to intestate inheritance by adjudication, or the right to adjudicate paternity herself.

At the time that statute ran in 1934, Petitioner had no right to intestate inheritance by adjudication of paternity, and would not have for another 42 years, until the right was granted by Florida Statutes § 732.108(2) in 1976. At that time, in 1934, Petitioner had no right to adjudicate her own paternity, and would not have for another 52 years, until the right was granted by Florida

Statutes § 742.011 in 1986. As in Dickson, the statute thus ran well before any right was given, and is therefore unconstitutional.

Application of the statute of limitations in effect at the time this case arose, Florida Statutes § 95.11(3)(b) enacted in 1986, gives the same result, however even more dramatically. That statute, it will be remembered, was the statute applied by the trial court and found to be unconstitutional by the District Court of Appeal. In that case, not only is the illegitimate effectively denied her right to prove paternity and to inherit under the first, 1932 statute, but is also denied her right to prove paternity and inherit by the 1986 amendment thereto.

Florida Statutes § 95.11(3)(b) (1991) provided that an action to adjudicate paternity must be brought within 4 years of the child's attaining the age of majority. The Petitioner attained majority (age 21) in 1953, thus if applied to Peittioner, the 1986

statute ran in 1957, 29 years before its enactment. At that time, in 1957, Petitioner had no right to intestate inheritance by adjudication of paternity, and would not have for another 19 years, until the right was granted by Florida Statutes § 732.108(2) in 1976. At that time, in 1957, Petitioner had no right to adjudicate her own paternity, and would not have for another 29 years, until the right was granted by Florida Statutes § 742.011 in 1986.

These results are the identical results ruled unconstitutional for denial of equal protection to the illegitimate by the Texas Supreme Court in Dickson, *supra*.

Application of state law in such a fashion creates the "impenetrable barrier" prohibited by this Court in Gomez v. Perez, 409 U.S. 535, 35 L.Ed. 2d 56, 93 S.Ct. 872 (1973). There, this Court enunciated the principle that illegitimate children could not be subjected to an "impenetrable barrier" to inheritance without violation of the equal

protection clause of the Fourteenth Amendment to the federal Constitution.

In Gomez, the illegitimate was totally denied the right to inherit; in the instant case, the illegitimate was totally denied the right to inherit for the first year of her life, until the right was granted in 1933, and thus provided only 2 remaining years before the statute of limitations imposed upon her ran. The Florida Supreme Court's decision creates an "impenetrable barrier" as to those 2 years for the illegitimate in that she could not inherit from the father by adjudication at the time of the running of the statute of limitations, and could not herself prove her own paternity by adjudication. Effectively, she has been denied the right to prove her paternity by an adjudication thereof, and the right to inherit, at any time throughout her entire life.

B. The Substantial Relationship Test is Violated.

Direct conflict with all recent decisions of this Court on the subject also exists if the "substantial relationship" test is applied, rather than the "impenetrable barrier" test. Thereunder, legislation must bear a substantial relationship to a legitimate or an important governmental interest. Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 172-3, 31 L.ed. 2d 768, 92 S.Ct. 1400 (1972). No legitimate governmental interest was either considered or enunciated by the Florida Supreme Court.

In its substituted opinion, the Court for the **first time** applied the original 1932, 3 year-from-birth statute of limitations. **That statute had never been applied, nor briefed, nor argued before.** After reference to the 1955 Florida case of Wall v. Johnson, 78 So. 2d 371 (1955), the Court stated at App. 15a, that, "Therefore, when Scruggs

failed to bring a paternity action within the time required by the then valid statute of limitations, her claim was extinguished." Despite the Florida Supreme Court having before it the clear arguments set forth in the "impenetrable barrier" test above, the 1932 statute was applied in the substituted opinion without any attempt to justify same with an important governmental interest. There is one scant reference earlier in the opinion (A-10a) to the state interest in promoting certainty in paternity adjudications by requiring same during the putative father's lifetime. This concept the Florida legislature itself rejected, in that, as the District Court pointed out at 640 So. 2d 1152, Florida Statutes § 732.108(2)(b) allows the proof of paternity before or after the death of the father. No substantial relationship to an important governmental interest having been shown, the decision conflicts with Weber, *supra*, and all of this Court's several rulings applying the

intermediate scrutiny test thenceforth.

With the holding of the Supreme Court that the 1932 statute applied, there is further direct conflict with this Court's unanimous decision in Reed v. Campbell, 476 U.S. 852, 90 L. Ed. 2d 858, 106 S. Ct. 2234. There, this Court held that a total statutory disinheritance from the paternal estate unless the parents subsequently married unconstitutionally discriminated against illegitimates. Here, in 1932, the illegitimate could not even inherit in this manner, and could only inherit if paternity was acknowledged in writing with a witness.

Direct conflict in the length of the 3 year statute of limitations to establish paternity applied to Peitioner occurs in decisions of this Court and other state Supreme Courts. The Supreme Court of Montana struck a 3 year statute of limitations as violative of equal protection, the same length as the Florida statute, in State Depatrment of Revenue v. Wilson, 634 P. 2d

172 (1981). The Supreme Court of Oklahoma similarly struck a 3 year statute of limitations in Callison v. Callison, 687 P. 2d 106 (1984) . In Clark v. Jeter, 486 U.S. 456, 463, 100 L. Ed. 465 , 108 S.Ct. 1910 (1988), this court struck down a 6 year statute of limitations, and reviewed the law and several prior cases similarly striking down statutes of limitations. The Florida Supreme Court's abrupt application of the 1932 statute of limitations thus clearly conflicts with the rulings of this Court and other state Supreme Courts.

II. The Question Presented is Important.

Many illegitimate children enter this world with the curse of only one parent - the mother. Although the father bears equal responsibility for the child, all too often the father is able to hide behind the false cloak of uncertainty as to his own paternity, and accordingly does not contribute to the child's welfare in any manner, at any time,

be it at birth, during life, or at death. The moral responsibility for bringing a child into this world is a continuing responsibility, not ending at a child's majority, but requiring compassionate and nurturing care, whether psychological or financial, throughout a parent's life. While society's attitude toward the duty of fathers of illegitimate children to acknowledge, to care for and to support them is changing, and with it the law and our organic federal constitution, the father is often assisted in avoiding his responsibilities by restrictions placed upon the illegitimate's ability to prove who her father is. Such is the case in this Petition.

It is important for this Court to move with society, in the direction of society, to attempt the cure of society's ills, and to interpret our federal constitution accordingly - to move in the direction of promoting the illegitimate's own right to prove and enforce her paternity, rather than

confirmation of an outmoded concept of proof, which has the base effect of promoting a father's ability to avoid responsibility. This case is important to illegitimates and to society as a whole, for the purpose of moving the law and society in the proper direction, forward towards responsibility and the future, rather than backward towards protection of fathers who seek to avoid what is virtual certain proof of paternity, whether the father be dead or alive, with HLA and DNA testing's now established evidentiary techniques. This Court must not leave in the dark recesses of the law a hiding place for those who choose not to accept the consequences of their acts, and leave innocent illegitimates and society to bear the continuing burdens thereof, burdens which do not end at majority, but which often continue throughout the illegitimate's entire life. The right of an illegitimate to inherit by intestacy would therefore unquestionably assist in alleviating

society's burdens, and would place them where they belong - on irresponsible fathers.

Our society is changing. The class of illegitimate children in the United States is growing rapidly, with illegitimates becoming a more significant segment of our population daily. Their rights under the federal Constitution are thus becoming a more prevalent subject of legal concern and litigation, which litigation can only be expected to increase. In the case before the Court, an illegitimate was denied equal protection and due process under the 14th Amendment to the federal Constitution in areas of law which can reasonably be expected to be the subject of intense litigation in the future, (1) the right of an illegitimate herself to prove paternity, and (2) the right of an illegitimate to inherit from her natural father.

These areas of law and thus the rights of illegitimates is now clouded by outmoded concepts whose primary rationalizations

include promoting the institution of marriage and discouraging illegitimacy, which historically and clearly have been ineffective, and promoting certainty in proof of paternity and in the probate process, technologically antiquated concepts when we have available to us HLA and DNA testing with virtual certain proof of paternity, be the father dead or alive. Such scientific proof speaks louder, even from the grave, than can the self-serving denials of any putative father from the witness stand, and makes the death of the father irrelevant, as Florida's own statutes recognize by allowing for proof of paternity after the father's death. State courts are utilizing decisions of this Court, most notably Lalli v. Lalli, 439 U.S. 259, 58 L. Ed. 2d 303, 99 S. Ct. 518, and a vacuum created by lack of direction, to perpetuate such concepts, august and just as they may have been at the time of rendition, which deny constitutional rights to illegitimates, a more and more significant class of citizens

each day.

Clarification of former law, the pronouncement of new law, and the extension of federal constitutional rights to illegitimates in the arenas of their own right to prove their paternity and their right to inherit from their natural father, the person responsible for bringing them into this world, are therefore desperately needed by this Nation.

III. The Decision is Wrong.

Petitioner was granted a birth certificate by the State of Florida which stated that her father was Charles Smith, allegedly the decedent. Petitioner knew this to be true her entire life, and posessed in her birth certificate an official state document so indicating.

Florida law provides in § 382.20, Florida Statutes, that "Certificates filed and accepted under this section. . . shall be admissible in evidence as prima facie

evidence of the facts recited therein. . .". Under Florida law, therefore, Petitioner's birth certificate is admissible into evidence; it constitutes prima facie proof of the facts therein; the father's identity is stated therein, and is thus prima facie proved.

There is a high probability of truthfulness and verity in state documents such as a birth certificate, Smith v. Mott, 100 So.2d 173, 176 (Fla. 1957), and Petitioner had every right to depend upon same as proof of her paternity and did depend upon same.

At this late point in her life, to permit Florida to disavow its own birth certificate, the proof which Petitioner held so dear her entire life, to suggest that she herself, as a 1 and 2 year old child, waited too long to prove the very paternity which the state acknowledged to her in her birth certificate, and then to hold that she cannot even legitimate herself by an adjudication

because her right to do so terminated in 1934, 52 years before the right was granted in 1986, cannot be more wrong. Petitioner's case, and the case of all similarly situated illegitimates, cries out for the wisdom of this Court and for its just hand to dispense fundamental fairness.

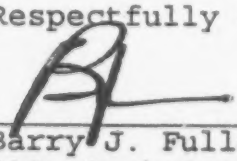
CONCLUSION

Application of Florida's paternity statute of limitations to Petitioner acts as the "impenetrable barrier" proscribed by this Court in Gomez v. Perez, *supra*, in that Petitioner never was provided the right to adjudicate her paternity. Such conclusion, and the conclusion that Petitioner was accordingly denied due process and equal protection of the laws under the Fourteenth Amendment to the federal Constitution, is shared by the Texas Supreme Court. The abruptly announced decision that a 1932 3-year statute of limitations applied to Petitioner has been held a denial of equal

protection by other state Supreme Courts and by this Court for up to 15 years. Florida's refusal to recognize its own birth certificate, prima facie proof of paternity itself and entitled to a high degree of truthfulness and verity, upon which Petitioner depended her entire life, and then its pronouncement that she cannot even prove her paternity by an adjudication because she delayed as a 1 and 2 year old in proving that which the state acknowledged to be prima facie fact, is unjust and wrong.

For the reasons stated, the Petition for Writ of Certiorari should be granted and the decision of the Florida Supreme Court should be reversed.

Respectfully Submitted,



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